Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 17-84
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	

PETITION FOR DECLARATORY RULING OF THE EDISON ELECTRIC INSTIUTE

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SUMMARY

The Edison Electric Institute ("EEI") requests that the Federal Communications Commission ("FCC" or Commission") issue a declaratory ruling clarifying that in all pole attachment complaint proceedings the "applicable statute of limitations" is the same as the 2-year period prescribed by Section 415(b) and that refunds in pole attachment complaint proceedings are not "appropriate" for any period preceding good faith notice of a dispute. Issuing this clarification by declaratory ruling will resolve uncertainty and minimize disputes regarding Rule 1.1407(a)(3) of the Commission's rules.

Although Rule 1.1407(a)(3) allows refunds "if appropriate" for a period "consistent with the applicable statute of limitations," the rule does not identify the "applicable statute of limitations." This has resulted in uncertainty over whether and when refunds are "appropriate" and, if so, for what period of time. Recently, the Commission has "borrowed" state law limitations periods applicable to breach of contract actions; however, this approach increases uncertainty, creates discriminatory limitations periods for identical claims against electric utility pole owners (as compared to incumbent local exchange carrier, a/k/a "ILEC" pole owners), and leads to variable results based solely on geographic fortuity. Moreover, it does not square with recent Commission decisions addressing the types of limitations periods that should apply in agency proceedings.

In recent years, the Commission has acted to provide guidance around the rules governing deployment of broadband services; however, confusion persists with respect to the permissible refund periods in pole attachment complaint proceedings, and this confusion undermines the Commission's goals of promoting broadband deployment. The clarifications requested by this Petition are consistent with the goals of the Communications Act—i.e., removing barriers to broadband deployment—because they will resolve uncertainty and the propensity for disputes, which will thereby facilitate access to existing infrastructure and decrease impediments to deployments, and accelerate the rollout of 5G to the benefit of U.S. consumers and the economy.

To remove uncertainty and avoid discriminatory results, rather than borrowing variable state law statutes of limitations, the Commission should "borrow" the more analogous limitations period set forth in Section 415(b), which applies to carriers. This approach would create consistency in the application of the Commission's rules by (1) making electric companies subject to the same limitations period applicable to pole attachment complaints against ILEC pole owners, and (2) eliminating the variable limitations periods applicable to pole attachment complaints against electric companies. This approach also would be more consistent with the Commission's recent guidance in *Sandwich Isles*, which specifically rejected the use of a limitations period applicable to civil actions in agency proceedings.

The Commission should also clarify that refunds are not "appropriate" under Rule 1.1407(a)(3) for any period preceding good faith notice of a dispute. Without notice of a dispute, a utility cannot reasonably discern whether or to what extent it might be exposed to "refund" liability. This is particularly true in ILEC complaints against electric companies that are governed by the *2011 Order* because the *2011 Order* did not establish a formula applicable to ILEC attachments on electric utility poles and did not establish any clear guidance for determining "just

and reasonable" rates. This is also true with respect to make ready charges, where attaching entities later claim that the actual cost of make ready work was somehow "unreasonable," because the Commission has not provided any benchmarks for determining what fees would have been reasonable for a particular project.

Under these circumstances, an electric utility should not be held to account for a liability that was neither reasonably discernable nor reasonably calculable. In several recent cases, ILECs are claiming tens of millions of dollars in refunds for periods that precede the ILEC even informing the electric utility that it took exception with the cost sharing arrangements set forth in the applicable joint use agreements. Not only does this practice thwart the intent of the Commission's ILEC complaint rule, but it also creates a liability for electric companies and their customers that is difficult—if not impossible—to reserve. These claims for massive, unreserve refunds serve as a barrier to negotiating new, going-forward arrangements which would serve the interest of broadband deployment. With respect to make-ready charges, the potential for massive refunds will create reluctance on the part of pole owners to commit resources to the pole replacements and other make-ready necessary for broadband deployment. The Commission can and should resolve these concerns through the declaratory ruling sought in this petition.

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Edison Electric Institute ("EEI") respectfully requests that the Federal Communications Commission ("FCC" or "Commission") issue a declaratory ruling clarifying (1) that the "applicable statute of limitations" under Rule 1.1407(a)(3) is the same as the two-year limitations period set forth in 47 U.S.C. § 415(b), and (2) that it is not "appropriate" for complainants to recover refunds for periods that precede good faith notice of a dispute. The result of this clarification will be to facilitate broadband deployments by eliminating a highly discriminatory and variable patchwork of limitations periods for claims arising under a single federal regulation. The requested clarifications will also serve to reduce uncertainty and opportunity for abuse under the Commission's rules, encourage attaching entities to make prudent deployment choices in a timely manner, and ensure attaching entities deal fairly with the utility pole owners. Removing the current uncertainty under the Commission's rule encourages the collaboration that is needed to achieve broadband deployments quickly and efficiently.

BACKGROUND

For the first 33 years of the Commission's pole attachment complaint jurisdiction, refunds, "if appropriate," were measured "from the date that the complaint, as acceptable, was filed."[1] In 2011, the Commission revised the rule to allow refunds, "if appropriate," for a period "consistent with the applicable statute of limitations."[2] Rule 1.1407(a)(3) currently provides:

> (a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:
>
> […]
>
> (3) Order a refund, or payment, **if appropriate**. The refund or payment will normally be the difference between the amount paid under the unjust or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, **consistent with the applicable statute of limitations**.

47 C.F.R. § 1.1407(a)(3) (emphasis added). Recent pole attachment complaint proceedings have revealed that Rule 1.1407(a)(3) is rife with uncertainty concerning whether and when refunds are "appropriate" and, if so, for what period of time.

While Rule 1.1407(a)(3) allows for the recovery of refunds "consistent with the applicable statute of limitations," the rule does not identify the "applicable statute of limitations." For more than 8 years after the effective date of the current version of Rule 1.1407(a)(3), the Commission deferred ruling on this issue.[3] In an attempt to fill this void, the Commission very recently has

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[1] *See* 47 C.F.R. § 1.1410(c) (1979) *and* 47 C.F.R. § 1.1410(c) (2010).

[2] 47 C.F.R. § 1.1407(a)(3).

[3] *See generally, Verizon Florida, LLC v. Florida Power and Light Company*, Memorandum Opinion and Order, Docket No. 14-216, 30 FCC Rcd 1140 (Feb. 11, 2015) ("*Verizon Florida Order*"); *In the Matter of Verizon Virginia, LLC and Verizon South, Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Order, 32 FCC Rcd 3750 (May 1, 2017); *In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, 35 FCC Rcd 5321 (May 20, 2020) ("*FPL I Order*").

applied variable state law limitations periods for breach of contract actions based on the "borrowing" doctrine employed by federal courts.[4]

There is also uncertainty under Rule 1.1407(a)(3) regarding when refunds are "appropriate." Two specific examples of where this uncertainty arises are: (1) in ILEC refund claims for payment periods governed by the *2011 Order*;[5] and (2) in claims for refunds of make-ready payments.

While the Commission provided ILECs with the right to file pole attachment complaints in the *2011 Order*, the Commission: (1) did not establish a formula applicable to ILEC attachments on electric utility poles; (2) did not impose an obligation on electric companies to unilaterally revise rates within joint use agreements; and (3) did not establish any clear guidance for determining "just and reasonable" joint use rates. Instead, the Commission (1) placed the burden of proof on ILECs to demonstrate that joint use agreements imposed unjust or unreasonable rates; (2) expressed reluctance towards disturbing existing joint use agreements; (3) stated that it was "unlikely" to find the rates, terms and conditions of existing joint use agreements unreasonable; and (4) expressed the importance of case-by-case resolution given the complex issues involved in any given joint use relationship.[6] Moreover, in the first decision released by the Commission under the 2011 version of the ILEC complaint rule, the Commission **denied** the ILEC's complaint that a $36.22/pole rate was unjust and unreasonable on its face, even though the $36.22/pole rate was

[4] *See In the Matter of Verizon Maryland LLC v. The Potomac Edison Company*, Memorandum Opinion and Order, Proceeding No. 19-355, 35 FCC Rcd 13607, 13626 at ¶¶ 40-42 (Nov. 23, 2020) ("*Potomac Edison Order*"); *In the Matter of BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Florida Power and Light Company*, Memorandum Opinion and Order, Proceeding No. 19-187, 2021 FCC LEXIS 124, at *9, ¶ 9 (Jan. 14, 2021) (*"FPL II Order*").

[5] *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240 (Apr. 7, 2011) (the "*2011 Order*").

[6] *2011 Order*, 26 FCC Rcd at 5333-38, ¶¶ 214-20.

nearly 3x the one-foot old telecom rate and more than 4x the one foot new telecom rate.[7] The Commission also explicitly stated that joint use rates were not "bound" by the Commission's rate formulas,[8] and then subsequently acknowledged the uncertainty spawned by the *2011 Order* regarding joint use rates.[9]

With respect to make-ready charges, the only guidance provided by the Commission thus far is that such charges must be "reasonable." This is an amorphous and ambiguous standard because it is not clear which make-ready engineering and construction charges might later be deemed excessive, despite these charges being based on actual costs, being charged in good faith, and being deemed necessary by utility pole owners faced with increasingly congested electric distribution pole networks that look considerably different than they did just one decade ago.

I. ABOUT EEI

EEI is the trade organization that represents U.S. investor-owned electric companies that provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. EEI's members own and operate vast overhead electric systems, including utility poles, as part of the electric industry's mission to provide smarter energy infrastructure that ensures the reliable, safe, secure, and efficient delivery of electric power to the public.

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[7] *See Verizon Florida Order*, 30 FCC Rcd at 1147-50, ¶¶ 20-24.

[8] *Verizon Florida Order*, 30 FCC Rcd 1140, 1149 at ¶ 23 ("In Verizon's view, there are only two possible just and reasonable rates for [ILEC] pole attachments—the New and Old Telecom Rates. But the Commission specifically found in the *Pole Attachment Order* that 'just and reasonable pole attachment rates for [ILECs] **are not bound by the formulas in sections 224(d) and (e)…"**) (bold-underline emphasis added).

[9] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd 7705, 7771 at ¶ 129 (Aug. 3, 2018) ("*2018 Order*") (adopting the Old Telecom Rate as a "hard cap" on joint use rates to "remove the potential for uncertainty" caused by the lack of clear guidelines under the *2011 Order*).

EEI is interested in the relief sought herein because its members collectively own tens of millions of poles. Many of these poles are jointly used by ILECs pursuant to joint use agreements. The cost sharing provisions of these joint use agreements collectively result in annual net revenues measured in the hundreds of millions of dollars. Any potential adjustment of these annual revenues is a significant issue to EEI members and their electric customers; however, the potential for massive, unreserved refunds covering periods that pre-date even the very first notice of a dispute is an even more significant issue. Further, EEI members routinely replace poles and perform other make-ready to accommodate broadband deployments. This work is typically reimbursed at cost, but the potential for massive refunds of these make-ready reimbursements may have a chilling effect on EEI members' participation in this important endeavor.

II. THE COMMISSION SHOULD CLARIFY THAT THE "APPLICABLE STATUTE OF LIMITATIONS" UNDER RULE 1.1407(a)(3) IS THE SAME AS THE 2-YEAR LIMITATIONS PERIOD SET FORTH IN 47 U.S.C. § 415(b).

Rule 1.1407(a)(3) allows refunds "consistent with the applicable statute of limitations," but neither Section 224 nor the Commission's rules establish "the applicable statute of limitations." The Commission has recently invoked the federal court practice of "borrowing" state statutes of limitations to fill this void. Applying the "borrowing" doctrine, the Commission has "look[ed] to the law of the state in which the utility's poles are located, determine[d] the state cause of action most analogous to the claims at issue, and applie[d] the statute of limitations governing that cause of action."[10] This approach to the "borrowing" doctrine is flawed, discriminatory, leads to highly variable results and creates regulatory uncertainty.

Application of the "borrowing" doctrine to pole attachment complaints has unreasonably increased uncertainty because application of state law limitations periods (1) *does not* actually

[10] *FPL II Order*, 2021 FCC LEXIS 124, at *9, ¶ 9.

comport with the "borrowing" doctrine, (2) results in a highly discriminatory and variable patchwork of limitations periods for claims arising under a single federal regulation, and (3) is in tension with recent Commission precedent addressing the types of limitations periods that should apply in agency proceedings. Accordingly, the Commission should issue a declaratory ruling clarifying that the "applicable statute of limitations" under Rule 1.1407(a)(3) is the same as the two-year limitations period set forth in 47 U.S.C. § 415(b).

A. Borrowing State Law Limitations Periods for Pole Attachment Complaints Against Electric Companies Is Plainly Discriminatory.

Pole attachment complaints against ILECs are governed by the two-year limitations period set forth in 47 U.S.C. § 415(b). Therefore, if a cable television system or a provider of telecommunications service files a pole attachment complaint against an ILEC seeking refunds under Rule 1.1407(a)(3), the ILEC's exposure is objectively defined and limited to two (2) years. In contrast, the Commission's recent application of state law statutes of limitations to pole attachment complaints against electric companies creates a patchwork of highly variable limitations periods that are: (1) much longer than the limitations period for pole attachment complaints against ILECs; and (2) discriminatory to pole owners that are not subject to the protections of Section 415(b). The chart below illustrates the disparity of state law breach of contract limitations periods in the states that are currently subject (in whole or in part) to the Commission's pole attachment jurisdiction:

Jurisdiction	Statute of Limitations	Limitations Period
AL	Ala. Code § 6-2-34(a)	6 years
AZ	Ariz. Rev. Stat. § 12-548(A)	6 years
CO	Colo. Rev. Stat. § 13-80-101(1)(a)	3 years
FL	Fla. Stat. § 95.11(2)(b)	5 years
GA	Ga. Code Ann. § 9-3-24	6 years
HI	Haw. Rev. Stat. § 657-1(1)	6 years
IL	735 Ill. Comp. Stat. 5/13-206	10 years
IN	Ind. Code § 34-11-2-11	10 years
IA	Iowa Code § 614.1(5)(a)	10 years
KS	Kan. Stat. Ann. § 60-511(1)	5 years
MD	Md. Code. Ann, Cts. & Jud. Proc. § 5-101	3 years
MN	Minn. Stat. § 541.05(1)	6 years
MS	Miss. Code Ann. § 15-1-49(1)	3 years
MO	Mo. Rev. Stat. § 516.120(1)	5 years
MT	Mo. Code Ann. § 27-2-202(1)	8 years
NE	Neb. Rev. Stat. § 25-205(1)	5 years
NV	Nev. Rev. Stat. § 11.190(1)(b)	6 years
NM	N.M. Stat. Ann. § 37-1-3(A)	6 years
NC	N.C. Gen. Stat. § 1-52(1)	3 years
ND	N.D. Cent. Code § 28-01-16(1)	6 years
OK	Okla. Stat. tit. 12, § 95(A)(1)	5 years
RI	R.I. Gen. Laws § 9-1-13(a)	10 years
SC	S.C. Code Ann. § 15-3-530(1)	3 years
SD	S.D. Codified Laws § 15-2-13(1)	6 years
TN	Tenn. Code Ann. § 28-3-109(a)(3)	6 years
TX	Tex. Civ. Prac. & Rem. Code § 16.051	4 years
VA	Va. Code Ann. § 8.01-246(2)	5 years
WI	Wis. Stat. § 893.43(1)	6 years
WY	Wyo. Stat. Ann. § 1-3-105(a)(i)	10 years

To put this into perspective, the shortest state law limitations period identified in the chart above (3 years) is fifty percent (50%) longer than the limitations period in Section 415(b)—the limitations period governing pole attachment complaints against ILECs. The longest state law limitations period (10 years) in the chart above is five hundred percent (500%) longer than the limitations period in Section 415(b). Applying Section 415(b) to pole attachment complaints against ILEC pole owners, while applying variable state law limitations periods to pole attachment

complaints against electric utility pole owners, is plainly discriminatory towards electric companies.

The application of variable state law limitations periods is also plainly discriminatory solely within the context of pole attachment complaints against electric companies. For example, a complainant operating in Indiana would theoretically be permitted to recover over 300% more in refunds than a similarly situated attacher operating in Mississippi. Conversely, an electric utility operating in Indiana would be exposed to 300% more liability for refunds than would an electric utility with operations in Mississippi facing an identical pole attachment complaint. These examples are not merely hypothetical. The Commission's application of the "borrowing" doctrine has already resulted in a forty percent (40%) variance in limitations periods under Rule 1.1407(a)(3).[11] A rule that creates such variable exposure under federal regulatory law—merely because of the accident of geography—undermines the goal of consistency implied in any federal regulation.

B. Applying State Law Limitations Periods to Pole Attachment Complaints Does Not Comport with the "Borrowing" Doctrine

Where a federal statute does not establish a limitations period, the "borrowing" doctrine instructs the adjudicating body to borrow "the local time limitation **most analogous** to the case at hand."[12] In two recent decisions, the Commission has applied a state law statute of limitations for

[11] *Compare Potomac Edison Order*, 35 FCC Rcd at 13626, ¶ 40 (applying Maryland's three-year limitations period for breach of contract actions) *with FPL II Order*, 2021 FCC LEXIS 124, at *9, ¶ 10 (applying Florida's five-year limitations period for a "legal or equitable action on a contract").

[12] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991), *superseded by statute*, Judicial Improvements Act of 1990, 101 P.L. 650, § 313, 104 Stat. 5089, 5115 (codified at 28 U.S.C. § 1658); *see also Reed v. Transp. Union*, 488 U.S. 319, 323 (1989), *superseded by statute*, 28 U.S.C. § 1658.

breach of contract actions to ILEC pole attachment complaints seeking refunds.[13] But, like every ILEC pole attachment complaint filed since the *2011 Order*, the ILECs in those proceedings did not allege that the electric companies were charging a rate that exceeded what could contractually be charged under their respective joint use agreements (or otherwise claim breach of contract or seek to enforce the rates, terms, or conditions of the joint use agreement). Instead, the ILECs claimed that the properly calculated contractual rate exceeded the undefined "just and reasonable" rate under federal law.[14] In other words, the ILECs did not seek to vindicate a contractual term **within** their joint use agreements, but rather sought to obtain relief **outside** the terms of their contracts. Because the "borrowing" doctrine requires the adjudicating body to apply the limitations period that is applicable to the **most analogous** state law cause of action, the application of state law limitations periods for extracontractual relief is not at all consistent with the "borrowing" doctrine that the Commission is purporting to apply under Rule 1.1407(a)(3). In fact, it is closer to the "exact opposite" than the "most analogous."

But even assuming *arguendo* that the ILECs' allegations could be construed as asserting breach of contract claims, the Commission's "borrowing" doctrine analysis would still fall woefully short. The Commission's "borrowing" doctrine analysis basically boils down to this: the ILECs' claims are analogous to state breach of contract actions because resolving the ILECs'

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[13] *See FPL II Order*, 2021 FCC LEXIS 124, at *9, ¶ 10 (applying Florida's five-year limitations period for a "legal or equitable action on a contract"); *Potomac Edison Order*, 35 FCC Rcd 13607, 13627-28 at ¶ 46 (applying Maryland's three-year limitations period governing breach of contract actions).

[14] *See Verizon Maryland LLC v. The Potomac Edison Company*, Proceeding No. 19-355, Bureau ID No. EB-19-MD-009, Pole Attachment Complaint at 1 (Nov. 21, 2019) ("The Commission should order Potomac Edison to refund more than [redacted] Potomac Edison collected **in violation of federal law** during the applicable three-year statute of limitations period and set Verizon's rate at the just and reasonable new telecom level."); *BellSouth Telecommunications, LLC v. Florida Power and Light Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Pole attachment Complaint at 19 (July 1, 2019) ("To date, AT&T has overpaid FPL by more than [redacted] million during the applicable five-year statute of limitations….The Commission should require FPL to refund these amounts, **which were collected in violation of federal law**.").

claims requires the Commission to refer to the joint use agreements.[15] The Commission's analysis *did not* compare the ILECs' allegations to the essential elements of a breach of contract claim, nor did it not look to foundational contract law principles—such as accord and satisfaction—to determine whether the ILECs were entitled to any relief under a state breach of contract cause of action. In other words, the Commission's determination that ILEC refund claims are analogous to state breach of contract claims is entirely unmoored.

C. Applying State Law Breach of Contract Limitations Periods to Pole Attachment Complaints Is Not Compatible with Other Commission Precedent.

The Commission's borrowing of state law limitations periods for breach of contract actions is also in tension with the Commission's recent decision in *Sandwich Isles*.[16] *Sandwich Isles* involved Commission proceedings against a service provider to recover high-cost universal service supports funds. The service provider raised the four-year limitations period in 28 U.S.C. § 1658(a) (the federal "catchall" limitations period) as precluding a significant portion of the Commission's claims.[17] The Commission previously had determined that its claims were governed by the Federal Debt Collection Improvement Act, which imposes no time limitations on the government's ability to recover debt through administrative offset. The Commission rejected the service provider's argument because the service provider "made no attempt to refute the Commission's determination that neither 28 U.S.C. § 1658(a) nor the Commission's policy preference to initiate and complete USAC investigations within five years can trump the express language of the Debt Collection

[15] *See Potomac Edison Order*, 35 FCC Rcd at 13267, ¶ 46; *FPL II Order*, 2021 FCC LEXIS 124, at *9, ¶ 10.

[16] *See In the Matter of Sandwich Isles Communications, Inc.*, Order on Reconsideration, WC Docket No. 10-90, 2019 FCC LEXIS 41, at * 159-70, ¶¶ 130-37 (Jan. 3, 2019) ("*Sandwich Isles*").

[17] *See id*. at *55, ¶ 40.

Act."[18] The Commission also went out of its way—"[f]or the sake of completeness"—to explain why the limitations period in Section 1658(a) was not applicable: Section 1658(a) "governs court actions, not agency proceedings."[19]

In making this determination, the Commission focused on the black letter of Section 1658(a) and interpreted its use of the term "action" to mean that it applies only to "judicial proceedings":

> Section 1658(a) provides: "Except as otherwise provided by law, **a civil action** arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." **The text, context, purpose, and history of Section 1658(a) makes clear that it governs court actions, not agency proceedings to recover improperly disbursed government funds**.
>
> Albeit not universally, the term "action" in legal parlance most commonly means a judicial proceeding. It is particularly reasonable to apply that gloss here because Section 1658(a) includes not only the term "civil action" but also references the underlying "cause of action."[20]

Nevertheless, less than two years after its decision in *Sandwich Isles*, the Commission explicitly applied a state law limitations period "governing **civil actions**" to an ILEC pole attachment complaint proceeding (i.e., an "agency proceeding"):

> Verizon argues that because this is a dispute about the rental rates Potomac Edison may lawfully impose under a contract, the most closely analogous state limitations period is Maryland's three year statute of limitations **governing civil actions, including breach of contract actions**. We agree.[21]

[18] *See id.* at *159-60, ¶ 130.

[19] *See id.* at *160-61, ¶¶ 130-31.

[20] *Id*. at *161-62, ¶¶ 131-32 (emphasis added).

[21] *Potomac Edison Order*, 35 FCC Rcd at 13626, ¶ 43 (emphasis added); *see also FPL II Order*, 2021 FCC LEXIS 124, at *9, ¶ 10 ("[W]e agree with AT&T that Florida's five-year statute of limitations for a '**legal or equitable action on a contract**' should apply.") (emphasis added).

The Commission's recent "borrowing" of state law limitations periods in ILEC pole attachment complaint proceedings is in conflict with the Commission's reasoning in *Sandwich Isles*, and the Commission has failed to acknowledge (let alone reconcile) its departure from the *Sandwich Isles* rationale. To the extent *Sandwich Isles* has not been overturned, a state law breach of contract limitations period (for "civil actions") cannot apply to pole attachment complaints (which are "agency proceedings").[22]

D. The 2-Year Limitations Period In 47 U.S.C. § 415(b) is Far More Analogous Than Variable State Law Breach of Contract Limitations Periods.

The "borrowing" doctrine specifically allows for the application of a federal limitations period "when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes" and "when federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking."[23] Under this standard, the Commission should "borrow" and apply the two-year limitations period in 47 U.S.C. § 415(b) to claims made against electric companies under Rule 1.1407(a)(3) for at least three reasons.

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[22] *See, e.g.,* Ala. Code § 6-2-34(a) (applying six-year limitations period to "**actions** upon any simple contract…"); Colo. Rev. Stat. § 13-80-101(1)(a) (stating that the "following **civil actions**," including "all contract **actions**," "shall be commenced within three years after the **cause of action** accrues"); Fla. Stat. § 95.11(2)(b) (applying five-year limitations period to "**[a] legal or equitable action** on a contract…"); Ga. Code Ann. § 9-3-24 ("All **actions** upon simple contracts shall be brought within 6 years…"); Ind. Code § 34-11-2-11 (applying ten-year limitations period to "an **action** upon contracts in writing other than those for payment of money…"); Md. Code. Ann., Cts. & Jud. Proc. § 5-101 (stating that "a **civil action at law**, which includes a breach of contract action, "shall be filed within three years from the date it accrues"); Miss. Code Ann. § 15-1-49(1) ("All **actions** for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such **action** accrued, and not after."); Okla. Stat. tit. 12, § 95(A)(1) (requiring that "**[c]ivil actions**," including "[a]n **action** upon any contract," be brought within five years); S.C. Code Ann. § 15-3-530(1) (applying 3-year limitations period to "an **action** upon a contract…"); S.D. Codified Laws § 15-2-13(1) (stating that "the following **civil actions**," including "[a]n **action** upon a contract," be commenced within six years); Wyo. Stat. Ann. § 1-3-105(a)(i) ("**Civil actions**…can only be brought within the following periods after the **cause of action** accrues: …Within ten (10) years, an **action** upon a specialty or any contract…").

[23] *Lamp, Pleva, Lipkind, Prupis & Petigrow*, 501 U.S. at 356 (quoting *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 172 (1983)).

First, Section 415(b) specifically applies to **agency proceedings** against carriers for the recovery of damages:

> **(b) Recovery of damages.** All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.[24]

Therefore, Section 415(b) provides a much "closer analogy" to refund claims under Rule 1.1407(a)(3) than state breach of contract actions.[25] This conclusion is bolstered by the fact that Section 415 is expressly applicable to Section 208 complaints; Section 208 complaints and Section 224 complaints are now governed by the same procedural rules.[26]

Second, Section 415(b) is a "significantly more appropriate vehicle for interstitial lawmaking" than state breach of contract limitations periods.[27] Rather than applying a highly variable patchwork of state law limitations periods applicable to civil actions, "borrowing" the Section 415(b) limitations period would create a uniform and nondiscriminatory limitations period for all refund claims arising under Rule 1.1407(a)(3). Moreover, the application of Section

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[24] 47 U.S.C. § 415(b).

[25] *Lamp, Pleva, Lipkind, Prupis & Petigrow*, 501 U.S. at 356 (adopting the federal limitations period within the same statute from which the implied cause of action arose, as opposed to the state law limitations period for a common law fraud action); *see also Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987) (finding that federal limitations period in the Clayton Act "provides a far closer analogy than any available state statute" for civil RICO claim), *superseded by statute*, 28 U.S.C. § 1658; *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. at 155, 165, 169 (applying 6-month federal limitations period where claim had no "close analogy" in state law and where federal limitations period was "actually designed to accommodate a balance of interest very similar to" those at stake in the case at bar), *superseded by statute*, 28 U.S.C. § 1658.

[26] *See* 47 C.F.R. § 1.1404(a) ("Pole attachment complaint proceedings shall be governed by the formal complaint rules in subpart E of this part, §§ 1.720-1.740, except as otherwise provided in this subpart J."); 47 C.F.R. § 1.720 ("The following procedural rules apply to formal complaint proceedings under 47 U.S.C. 208, pole attachment complaint proceedings under 47 U.S.C. 224…").

[27] *Lamp, Pleva, Lipkind, Prupis & Petigrow*, 501 U.S. at 356 (quoting *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 172 (1983)).

415(b)'s limitations period would be consistent with the Commission's decision in *Sandwich Isles* given that Section 415(b) expressly applies to agency proceedings (as opposed to civil actions).

Third, as referenced in Section II.A *supra*, there are two types of entities against whom pole attachment complaints are filed: ILECs and electric companies. If a cable television system seeks a refund from an ILEC pole owner based on the theory that the pole attachment rental fees charged by the ILEC exceeded the Commission's maximum formula, that claim is undoubtedly governed by the two-year limitations period in Section 415(b) because the ILEC is a "carrier." If a cable television system filed the exact same claim against an electric utility, it would—under the Commission's recent use of the "borrowing" doctrine—be subject to variable state law limitations periods. This creates a situation where not only the location of the entity but also the type of entity is determinative of the "applicable statute of limitations" for the exact same claim under federal law. Applying the two-year limitations period in Section 415(b) to all claims under Rule 1.1407(a)(3)—not just those against ILECs—will eliminate the highly discriminatory, two-track framework that has resulted from the Commission's recent applications of the "borrowing" doctrine.[28]

III. THE COMMISSION SHOULD CLARIFY THAT IT IS NOT "APPROPRIATE" FOR A COMPLAINANT TO RECOVER REFUNDS FOR PERIODS THAT PRECEDE GOOD FAITH NOTICE OF THE DISPUTE.

Rule 1.1407(a)(3) allows the Commission to "[o]rder a refund, or payment, if appropriate" but neither Section 224 nor the Commission's rules establish when a refund is "appropriate." Under the old version of the rule, "notice" (or lack thereof) was not an issue because refunds, "if

[28] Borrowing the two-year statute of limitations in Section 415(b) would also be consistent with the legislative history of the amendments to Section 415. When Congress was considering expanding the limitations period in Section 415(b) from one-year to two years, telephone companies argued that Section 415(a)—which governs actions **by** a carrier—should similarly be extended from one-year to two-years for purposes of equality, fairness, equity and to avoid dissymmetry. *See* S. Rep. No. 93-796, at 3 (1974). Congress accepted this rationale and, in the same amendment, extended the limitations period under 415(a) to two years. *See id.* at 4.

appropriate," were measured "from the date that the complaint, as acceptable, was filed." In other words, by operation of the rule, refunds could never precede good faith notice of a dispute.

With respect to ILEC refund claims governed by the *2011 Order*, for example (and as noted above), there were no objective measures or subsequent Commission decisions by which electric companies could discern whether the cost sharing arrangements within their joint use agreements were in need of revision. In fact, given the *2011 Order's* expressed reluctance to disturb existing joint use agreements, given the Commission's 2015 decision in *Verizon Florida*, and given the immense financial benefits ILECs enjoy under joint use agreements, an electric utility had no reason to believe—especially in the absence of an objection from the ILEC—that a refund would be likely or even probable. Further, even if an electric utility could arrive at a rationale "guess" as to what just and reasonable rate might have been under the *2011 Order*, there is even less guidance (to say nothing of the Commission's complete lack of jurisdiction) on the important question of the appropriate rate for an ILEC's attachments on an electric utility's pole—an essential component of ascertaining any potential "refund" liability under a joint use agreement. In light of this uncertainty and opportunity for abuse by attaching entities, the Commission should clarify that it is not "appropriate" for complainants to recover refunds for periods that precede notice of a good faith dispute.

A. The Evolution of the Commission's Refund Rule.

For more than three decades, the Commission's refund rule permitted refunds only for periods **after** the filing of a pole attachment complaint.[29] Implicit in this rule was the concept that

[29] *See* 47 C.F.R. § 1.1410(c) (1979) (stating that the "refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission **from the date that the complaint, as acceptable, was filed**, plus interest") (emphasis added) *and* 47 C.F.R. § 1.1410(c) (2010) (stating that the "refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the

attachers were not entitled to recover refunds unless and until a utility was afforded notice that its rates were potentially "unjust and unreasonable."[30] As part of the *2011 Order*, however, the Commission revised its refund rule "to allow monetary recovery in a pole attachment action to extend as far back in time as the applicable statute of limitations allows."[31] The Commission provided two policy justifications for revising its longstanding refund rule. First, the Commission stated that, by limiting attachers to recovering refunds only from the date on which a pole attachment complaint is filed, the former refund rule "fail[ed] to make injured attachers whole."[32] Second, the Commission stated that the former refund rule "discourage[d] pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment."[33] While these policy justifications might be served in a proceeding involving a dispute over a rate or fee that is reasonably calculable under the Commission's rules, they are not served in proceedings involving disputes over ILEC rates under the *2011 Order* or the "reasonableness" of make-ready charges.

B. Because "Just and Reasonable" Joint Use Rates (Especially Under the *2011 Order*) Are Not Reasonably Discernable, It Is Not "Appropriate" for

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rate, term, or condition established by the commission **from the date that the complaint, as acceptable, was filed**, plus interest") (emphasis added).

[30] In adopting its original refund rule, the Commission rejected a proposal that refunds be calculated "from the date the unreasonable or unjust rate was first paid." *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 F.C.C. 2d 1585, 1600 at ¶ 45 (Aug. 11, 1978). The Commission agreed with the notion that "refunds from the date of complaint are entirely appropriate in a complainant form of regulation," and concluded that allowing refunds only from the date of the complaint would "avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator." *Id.*

[31] *2011 Order*, 26 FCC Rcd at 5290, ¶ 112.

[32] *Id.* at 5289, ¶ 110.

[33] *Id*.

Complainants to Recover Refunds for Payment Periods Preceding Notice of a Dispute.

In its *2011 Order*, which for the first time granted ILECs the right to file pole attachment complaints against electric companies, the Commission explicitly declined to adopt a rate or formula applicable to ILEC attachments and explicitly stated that "just and reasonable pole attachment rates for [ILECs] are not bound by the formulas in sections 224(d) or (e)."[34] In lieu of establishing a rate or formula for ILEC attachments, the *2011 Order* merely identified the Old Telecom Rate as a "reference point in complaint proceedings."[35] The Commission diluted even this amorphous guidance by expressing reluctance towards disturbing existing joint use agreements and by noting that it was "unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable."[36] Under this framework, it was impossible for electric companies to discern, with any reasonable particularity, a "just and reasonable" joint use rate under the *2011 Order*. The Commission acknowledged as much in its *2018 Order*, wherein it adopted the Old Telecom Rate as a "hard cap" on joint use rates to "remove the potential for uncertainty" caused by the *2011 Order's* ambiguous guidance.[37]

In sum, there is simply no way for an electric utility to determine whether an ILEC has been "injured" by a cost sharing structure within an existing joint use agreement, let alone the amount of refunds necessary, if any, to make that ILEC "whole." Further complicating this determination, an electric utility had no way of discerning how the rate it paid an ILEC under a

[34] *2011 Order*, 26 FCC Rcd at 5336, ¶¶ 217.

[35] *Id.* at 5336-37, ¶¶ 218.

[36] *Id*. at 5335, ¶ 216.

[37] *2018 Order*, 33 FCC Rcd at 7771, ¶ 129.

joint use agreement—which is outside the Commission's jurisdiction—should be revised.[38] This calls into question the "appropriateness" of allowing ILECs to recover refunds **at all** for periods governed by the *2011 Order*.[39]

While electric companies had no way of knowing whether their existing joint use rates were "just and reasonable" under the *2011 Order*, electric companies also had no reason to believe that they were "unjust or unreasonable"—unless the rates, terms or conditions were disputed as such by their ILEC joint use partners. As noted above, the Commission expressly stated that it was "unlikely" to find rates within existing joint use agreements "unjust or unreasonable."[40] The Commission's first decision under the original ILEC complaint rule reaffirmed this policy statement.[41] In its *Verizon Florida Order*, the Commission **rejected** an ILEC's claim that a $36.22 per pole rate (which was more than 4x the one-foot New Telecom Rate and nearly 3x the one-foot Old Telecom Rate) was facially unjust or unreasonable.[42] In reaching its decision, the Commission reiterated that "just and reasonable" joint use rates were not bound by the Commission's rate formulas.[43] Perhaps more importantly, given that joint use agreements often provide immense

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[38] *See, e.g., 2011 Order*, 33 FCC Rcd at 5337, ¶ 218 (noting that the Commission "would be skeptical of a complaint by an [ILEC] seeking a proportionately lower rate to attach to an electric utility's poles that the rate the [ILEC] is charging the electric utility to attach to its poles"); *Potomac Edison Order*, 35 FCC Rcd at 13630, ¶ 51 (ordering the parties to "negotiate a new reciprocal joint use agreement…that reflects the proportional rates for [the electric utility's] attachments to [the ILEC's] poles").

[39] *See* 47 C.F.R. § 1.1407(a)(3) (providing Commission discretion to award refunds, "**if appropriate**").

[40] *2011 Order*, 26 FCC Rcd at 5335, ¶ 216.

[41] *See Verizon Florida Order*, 30 FCC Rcd at 1140-41, ¶ 2 (rejecting ILEC's argument that joint use rates were *per se* unlawful because they exceeded the New Telecom Rate and Old Telecom Rate and finding that ILEC failed to demonstrate that its joint use rate was "unjust or unreasonable").

[42] *See id*. at 1140-41, ¶ 2 (rejecting ILEC's argument that electric utility's rates were "per se unlawful" because they exceeded the Commission's rate formulas).

[43] *Id*. at 1149 at ¶ 23 ("In Verizon's view, there are only two possible just and reasonable rates for [ILEC] pole attachments—the New and Old Telecom Rates. But the Commission specifically found in the *Pole Attachment Order* that 'just and reasonable pole attachment rates for [ILECs] **are not bound by the formulas in sections 224(d) and (e)…"**) (bold-underline emphasis added).

financial benefits to ILECs, electric companies not only had every reason to believe that the cost sharing arrangements within those joint use agreements were "just and reasonable" but also had reason to believe, especially in the absence of any objections, that ILECs themselves viewed the cost sharing arrangements as "just and reasonable." In other words, refund claims were entirely unforeseeable under the *2011 Order*—barring notice of a rate dispute.

ILECs are now exploiting the highly speculative nature of refund claims under the *2011 Order* to gain unfair leverage in complaint proceedings and the negotiations preceding complaint proceedings. As forewarned by electric companies in the rulemaking proceedings culminating in the *2011 Order*, ILECs are abusing Rule 1.1407(a)(3) by withholding notice of rate disputes, accumulating potential refund claims for the duration of the "applicable statute of limitations," and filing pole attachment complaints against electric companies with massive refund claims.[44] Moreover, recent complaint proceedings have revealed that ILECs are seeking to recover refunds under the *2011 Order* for payment periods that even precede the date on which the ILECs first provided notice of the rate dispute to the electric companies (and the applicable statute of limitations, whatever it is). For example, AT&T filed a pole attachment complaint against

[44] *See, e.g.,* Comments of the Edison Electric Institute and the Utilities Telecom Council at 51, WC Docket No. 07-245, GN Docket No. 09-51 (Aug. 16, 2010) ("[T]he FCC's proposal would encourage unscrupulous attaching entities to seek out ways to 'game the system' in order to obtain a financial windfall."); Comments of the Coalition of Concerned Utilities at 93, WC Docket No. 07-245, GN Docket No. 09-51 (Aug. 16, 2010) ("[P]ermitting attachers to recover refunds dating back years before a complaint is filed would eliminate any incentive for them to resolve rate issues in a timely manner. Rate disputes will drag on indefinitely, and the amount potentially to be refunded will grow proportionately, so the dispute will increase in significant the longer the matter remains unresolved."); Comments of the Alliance for Fair Pole Attachment Rules at 68, WC Docket No. 07-245, GN Docket No. 09-51 (Aug. 16, 2010) ("The Alliance objects to this proposed rule change because it would discourage timely filing of complaints and lead to abuses of the complaint process."). Significantly, the Commission found these objections to be "unpersuasive" and rejected the contention that "the proposed rule change creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission." *2011 Order*, 26 FCC Rcd at 5289, ¶ 111. History, though, has proven the electric companies' concerns to be merited.

Alabama Power Company ("Alabama Power") on April 22, 2019.[45] Despite not providing Alabama Power with notice of the rate dispute until March 7, 2018,[46] AT&T sought refunds for payment periods spanning from 2012 to 2017 under Alabama's six-year limitations period for breach of contract actions.[47] AT&T also filed a pole attachment complaint against Duke Energy Florida, LLC on August 25, 2020.[48] Despite not providing Duke Energy Florida, LLC with notice of the rate dispute until May 22, 2019,[49] AT&T is seeking refunds for payment periods spanning from 2015 to 2019 under Florida's five-year limitations period for breach of contract actions.[50] The injection of massive refund claims into complaint proceedings creates an enormous hurdle for resolving rate disputes and undermines one of the key policy aims underpinning Rule 1.1407(a)(3)—promoting informal resolution of rate disputes.[51] Therefore, the Commission should clarify that it is not "appropriate" under Rule 1.1407(a)(3) to allow an ILEC to recover

[45] *See BellSouth Telecommunications, LLC d/b/a AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Pole Attachment Complaint (Apr. 22, 2019).

[46] *See BellSouth Telecommunications, LLC d/b/a AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint at 5 (Jul. 21, 2019).

[47] *See BellSouth Telecommunications, LLC d/b/a AT&T Alabama v. Alabama Power Company*, Proceeding No. 19-187, Bureau ID No. EB-19-MD-006, Pole Attachment Complaint at 26 n.122, 29 (Apr. 22, 2019).

[48] *See BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, Pole Attachment Complaint (August 25,2020).

[49] *See BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint at 21 (Oct. 30, 2020).

[50] *See BellSouth Telecommunications, LLC d/b/a AT&T Florida v. Duke Energy Florida, LLC*, Proceeding No. 20-276, Bureau ID No. EB-20-MD-003, Pole Attachment Complaint at 21-22, 22 n.94, 26 (August 25,2020).

[51] *2011 Order*, 26 FCC Rcd at 5289, ¶ 110 (justifying rule revisions on grounds that prior version of rule "discourage[d] pre-complaint negotiations between the parties" to resolve disputes about rates…").

refunds for any payment period prior to the date on which the ILEC provides good faith notice of the rate dispute to an electric utility.[52]

But allowing ILECs to recover refunds for periods preceding notice is not just "inappropriate." It is also highly prejudicial to electric companies because of the challenges associated with reserving for such highly speculative refund claims. The potential for massive, unreserved refund liability, coupled with the Commission's recent efforts to unwind joint use agreements, undermines the Commission's policy of fostering innovative solutions to broadband deployment. It bears emphasizing that the ubiquitous deployment of first-generation communications infrastructure was made possible by voluntary, mutually beneficial joint use agreements. These agreements not only reduced deployment costs but also served important public policy aims, such as enabling virtually universal electric and telephone service and sparing communities the aesthetic nuisance of redundant pole lines. By providing the clarification requested herein, the Commission would foster an environment where innovation in infrastructure solutions can thrive.

C. Because "Just and Reasonable" Make-Ready Charges Are Not Reasonably Discernable, It Is Not "Appropriate" for Complainants to Recover Refunds for Payment Periods Preceding Notice of a Dispute.

For similar reasons, it is also generally not "appropriate" to allow attachers to recover refunds of make-ready payments for periods that precede notice of a dispute. Like ILEC rates under the *2011 Order*, "just and reasonable" make-ready charges are not reasonably determinable. There are no formulas or "reference points" for calculating reasonable make-ready charges. Instead, the Commission's guidance on this issue basically boils down to this—such charges must be "reasonable." Under existing Commission precedent, it is not even clear whether it is

[52] *See* 47 C.F.R. § 1.1407(a)(3) (providing Commission discretion to award refunds, "**if appropriate**").

presumptively "just and reasonable" to charge an attacher for the actual cost an electric utility incurs in performing make-ready. This lack of clarity, coupled with the lack of clear guidance on whether and when attachers are required to notify pole owners of disputes regarding make-ready charges, encourages abuse of Rule 1.1407(a)(3). For example, a utility pole owner could proceed with make-ready on 50,000 poles during the course of a major, statewide broadband buildout over a five-year period—with nothing more than actual costs being charged back to the broadband provider—only to find itself subject to a refund claim for a large portion of these costs which the attaching entity agreed to pay and which the pole owner believed to be prudently incurred. This potential for attaching entities to seek a refund covering many years of make-ready reimbursements is not encouraging the prudent analysis of broadband deployments or the timely resolution of disagreements. Furthermore, the potential for massive, unforeseeable refund claims will simply discourage electric companies from committing resources to pole replacements and other make-ready necessary for broadband deployment.

D. In Disputes Challenging the "Reasonableness" of ILEC Rates (Especially Under the *2011 Order*) or Make-Ready Charges, the Commission Should Clarify that It Is Not "Appropriate" for Complainants to Recover Refunds for Any Payment Period that Precedes Good Faith Notice of the Dispute.

Accordingly, for disputes challenging ILEC rates under the *2011 Order* or the reasonableness of make-ready charges, the Commission should clarify that, under Rule 1.1407(a)(3), it is not "appropriate" for a complainant to recover refunds for payment periods that precede the date on which the complainant provided the electric utility with good faith notice of the dispute. This clarification would serve a primary policy aim of Rule 1.1407(a)(3)—the promotion of pre-complaint settlement negotiations.[53] By clarifying that complainants are required

[53] *2011 Order*, 26 FCC Rcd at 5289, ¶ 110 (justifying rule revisions on grounds that prior version of rule "discourage[d] pre-complaint negotiations between the parties" to resolve disputes about rates…").

to provide notice of a dispute to electric companies as a precondition of recovering refunds, complainants will be encouraged to provide timely notice of disputes to electric companies, thereby inducing pre-complaint settlement negotiations before potential refund claims grow into an impediment to informal dispute resolution. When combined with a two-year limitations period, the requested clarifications would also curtail abusive practices under Rule 1.1407(a)(3), such as withholding notice of a dispute from electric companies for the duration of the "applicable statute of limitations."

IV. THE COMMISSION HAS AUTHORITY TO ISSUE THE DECLARATORY RELIEF REQUESTED HEREIN.

Section 5(d) of the Administrative Procedure Act, 5 U.S.C § 554(e), provides: "The agency, with like effect as in the case of other orders, and in its sound discretion, **may issue a declaratory order to terminate a controversy or remove uncertainty**." Rule 1.2 of the Commission's rules provides: "**The Commission may**, in accordance with Section 5(d) of the Administrative Procedure Act, [5 U.S.C. § 554(e),] **on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.**"[54]

By issuing a declaratory ruling interpreting Rule 1.1407(a)(3) and clarifying its own implementing guidance, the Commission can resolve the disputes and uncertainty described above regarding: (1) the "applicable statute of limitations" for pole attachment complaints, and (2) when refunds are "appropriate" in pole attachment complaint proceedings involving disputes over ILEC

[54] 47 C.F.R. § 1.2 (emphasis added); *see also* 47 C.F.R. § 0.91(b) ("The [Wireline Competition] Bureau will, among other things . . . [a]ct on requests for interpretation or waiver of rules."); *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 35 FCC Rcd 7936, 7938 at ¶ 6 n.12 (Jul. 29, 2020) ("*Declaratory Ruling on CTIA Petition*") ("Neither of the two clarifications adopted today [regarding the petition for declaratory ruling filed by CTIA] requires the adoption of a substantive rule because they merely resolve uncertainty surrounding previous Commission orders and the underlying pole attachment rules. The Administrative Procedure Act and the Commission's rules give use wide latitude to resolve such uncertainties via declaratory rulings…").

rates or make-ready charges.[55] In addition, as explained above, issuance of the requested declaratory ruling would help achieve the Commission's stated goal of minimizing litigated disputes and promoting pre-complaint settlement negotiations.[56]

A declaratory ruling, as opposed to a notice of proposed rulemaking, is appropriate here because Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 553(b)(A), provides an exception to the requirement of notice and comment rulemaking for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." As stated by the United States Supreme Court:

> Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "**interpretative rules, general statements of policy, or rules of agency** organization, **procedure**, or practice." 5 U. S. C. §553(b)(A). The term "interpretative rule,"…is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate….We need not, and do not, wade into that debate here. For our purposes, it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[57]

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[55] *See* 47 C.F.R. § 1.1407(a)(3); *see also In the Matter of BellSouth's Petition for Declaratory Ruling Regarding the Commission's Definition of VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Chargers on VoIP Customers in 47 U.S.C. § 615a-1(f)(1); Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC No. 2:15-cx-00765-SGC (N.D. Ala.)*, Declaratory Ruling, 34 FCC Rcd 10158, 10160-64 at ¶¶ 5-9 (Oct. 30, 2019) (issuing a declaratory ruling regarding VoIP Fee Parity Provision in order to address repeated disputes regarding 911 fees arising from ambiguity in controlling statutory provision); *In the Matter of Connect America Fund; Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling, 30 FCC Rcd 1587, 1588 at ¶ 2 (Feb. 11. 2015) (issuing declaratory ruling regarding VoIP symmetry rule in order to resolve a dispute arising out of conflicting interpretations of that rule).

[56] *See, e.g., In the Matter of Implementation of State and Local Government's Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, Declaratory Ruling and Notice of Proposed Rulemaking, 35 FCC Rcd 5977, 5997 at ¶ 40 (Jun. 10, 2020) (issuing declaratory ruling providing examples of aesthetics related conditions "to decrease future dispute and to help inform resolution of disputes should they arise").

[57] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96-97 (2015) (emphasis added); *see also Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1377 (Fed. Cir. 2001) ("the challenged rule, which does no more than interpret the requirements of [the governing statute], and clarifies the agency's earlier interpretation of that statute, is an interpretive rule not subject to the notice and comment requirements of the APA"); *Am. Postal Workers Union v. United States Postal Serv.*, 707 F.2d

Here, the Commission's very recent decisions to "borrow" state law limitations periods were within the context of specific pole attachment complaint proceedings, and not in the context of notice and comment rulemaking proceedings. It is thus possible for the Commission to alter its position on this issue and to further clarify the meaning of Rule 1.1407(a)(3) without a notice and comment rulemaking proceeding.[58]

Further, the Commission's previous discussion within the *2011 Order* regarding whether notice of a dispute should be required as a precondition to recovering refunds constitutes either an interpretive rule or a statement of general policy that is exempt from notice and comment rulemaking proceedings.[59] It bears mentioning that the Commission's discussion of the proposed notice requirement did not specifically contemplate (or even reference) rate disputes between ILECs and electric companies, which are governed by an entirely different complaint rule and standard than disputes involving CATV and CLEC attachers. Thus, a declaratory ruling by the Commission clarifying its position would not require a notice and comment rulemaking proceedings.[60]

548, 559 (D.C. App. 1983) (finding that the Office of Personnel Management's change in method for computing annuities was not subject to the rulemaking requirements under § 553 because both the old and new methods were interpretive rules, and stating "the new rule meets the classic definition of an interpretative rule: it is a 'statement as to what the administrative officer thinks the statute or regulation means.'") (internal citations omitted).

[58] *See Chisholm v. FCC*, F.2d 349, 365 (D.C. App. 1976) D.C. App. ("The original interpretation of the 1959 exemptions, which the 1975 *Opinion* reversed, was also established by adjudication; thus reversal by adjudication seems particularly appropriate here."); *see City of Arlington v. FCC*, 668 F.3d 229, 241 (5th Cir. 2012) ("[D]eclaratory rulings issued pursuant to [the Commission's] grant of authority are informal adjudications under the APA.")

[59] *2011 Order*, 26 FCC Rcd at 5290, ¶ 112; *see* 5 U.S.C. § 553(b)(A).

[60] *See Am. Postal Workers Union*, 707 F.2d at 559; *Declaratory Ruling on CTIA Petition*, 35 FCC Rcd 7936, 7938 at ¶ 6 n.12.

V. CONCLUSION

EEI respectfully requests that the Commission issue the declaratory ruling set forth in this petition because the relief sought will facilitate the deployment of broadband by removing discriminatory limitations periods thereby resolving uncertainty and minimizing future disputes by bringing consistency as well as clarity to the application of Rule 1.1407(a)(3).

Respectfully submitted,

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